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**DIVISION I OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON**

ELSA ROBB, personal representative of the
ESTATE OF MICHAEL W. ROBB,

Appellee,

vs.

CITY OF SEATTLE, a municipal corporation;
OFFICER KEVIN MCDANIEL; OFFICER PONHA LIM,

Appellants,

and

UNKNOWN JOHN DOES,

Appellees.

**BRIEF OF APPELLANTS CITY OF SEATTLE, OFFICER KEVIN
MCDANIEL AND OFFICER PONHA LIM**

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I. INTRODUCTION

Elsa Robb brought a negligence suit against the City of Seattle and two of its police officers ("City"), alleging liability for the death of Michael Robb, who was murdered by Samson Berhe. The suit alleges that the City had a duty to prevent the murder because the officers had a previous contact with Berhe in an unrelated residential burglary investigation, during which Berhe was quickly excluded as a suspect.

The duties of police officers to members of the public are limited by the public duty doctrine. Under the doctrine, a governmental entity performing governmental functions does not have a duty of care to individuals, as opposed to the public at large, unless one of four exceptions applies. The trial court found that it was undisputed that none of those exceptions exists here. Therefore, the City had no duty to Michael Robb to prevent his murder. The trial court erred in failing to grant summary judgment.

The trial court also erred by misapplying §302B of the Restatement (Second) of Torts. Section 302B does not itself create a duty. It only addresses the nature of the conduct that can establish a breach, if a duty of care has otherwise been established. Here, the City cannot be liable where no exception to the public duty doctrine applies. Section 302B cannot

impose a duty of care on police officers whose conduct otherwise falls within the scope of the public duty doctrine.

II. ASSIGNMENTS OF ERROR

The trial court erred by:

1. denying the City's motion for summary judgment,¹ and
2. denying the City's motion for reconsideration of the order denying the City's motion for summary judgment.²

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. **Where none of the exceptions to the public duty doctrine is present, did the City have an actionable duty of care to Robb? (Assignments of Error 1, 2)**
2. **Does §302B of the Restatement (Second) of Torts impose an actionable duty of care on the City despite the immunity conferred by the public duty doctrine? (Assignments of Error 1, 2)**

IV. STATEMENT OF THE CASE

A. Statement of Relevant Facts

Between 2002 and 2005, the Seattle police had six encounters with

¹ "Order Denying Defendants' Motion for Summary Judgment" entered by the Honorable Gregory Canova on March 17, 2009. CP 400-402.

² "Order Denying Defendants' Motion to Reconsider Denial of Their Motion for Summary Judgment, or In the Alternative to Clarify Order of Denial" entered by the Honorable Gregory Canova on April 8, 2009. CP 416-419.

Samson Berhe.³ One was an arrest, one was a questioning without arrest, and four were transports to Harborview Medical Center for commitment.⁴

On June 26, 2005, officers Kevin McDaniel and Ponha Lim questioned Berhe and his companion on suspicion of residential burglary.⁵ During the interrogation the officers did not perform a warrant check⁶ or arrest Berhe.⁷ They did observe three or four shotgun shells lying on the ground about 10 feet from where Berhe was standing, but did not confiscate the shells.⁸ The companion volunteered the location of the other items, the items were all found at that location, and the companion

³ For purposes of this appeal, the City does not contest relevant assertions in the Complaint. *See* Complaint for Damages and Jury Demand ("Complaint") at CP 10, ¶ 5.5 (2002 arrest for vehicle theft); CP 10, ¶ 5.6 (2004 transport to Harborview); CP 11, ¶ 5.7 (2004 transport to Harborview); CP 12, ¶ 5.13 (2005 transport to Harborview); CP 13, ¶ 5.16 (2005 transport to Harborview); CP 14, ¶ 5.19 (2005 questioning for sleeping in vacant house). *See also* Answer of Defendants City of Seattle, Officer Kevin McDaniel, and Officer Ponha Lim ("Answer") at CP 23, ¶¶ 5.5 - 5.7; CP 24, ¶¶ 5.13, 5.16, 5.19.

⁴ *Id.*

⁵ Complaint, CP 14-15, at ¶¶ 5.20, 5.21; Answer, CP 24-25, at ¶¶ 5.20, 5.21. There is no evidence supporting the allegation of ¶ 5.20 that "Just before the officers arrived, Berhe discarded several live shotgun shells from his pocket onto the ground."

⁶ Had they performed a warrant check, they would have found no warrant. Declaration of Cynthia Dalesky, CP 156:9-157:18.

⁷ The officers had no probable cause to arrest Berhe. Declaration of Ponha Lim in Support of Defendants' Motion for Summary Judgment, CP 93:20-94:2; Declaration of Kevin McDaniel in Support of Defendants' Motion for Summary Judgment, CP 127:6-11. Valencia then volunteered the location of the other items. CP 93: 1-10, CP 126: 7-16. The victim of the burglary identified one of the stolen items on Berhe's companion, Raymond Valencia. Declaration of Ponha Lim, CP 93:1-10; Declaration of Kevin McDaniel, CP 126:7-16.

⁸ Complaint, at CP 14, ¶ 5.20; Statement of Kevin McDaniel, CP 170.

was taken to the station house for arrest.⁹ The officers released Berhe.¹⁰

Over an hour later Berhe fatally shot plaintiff's decedent Michael Robb.¹¹ The murder occurred at a different location from the place where the officers had questioned Berhe.¹² There is no evidence that any of the shells present nearby when the officers questioned Berhe and his companion were used to kill Michael Robb.

B. Procedural History

Elsa Robb sued the City for negligence,¹³ alleging that the City was negligent because the officers "failed to retrieve the shotgun shells" and "failed to make a proper search for outstanding warrants and/or failed to arrest Berhe" at the burglary stop.¹⁴ Robb further alleged that the City was "negligent in failing to place Berhe in secure custody prior to the fatal shooting of Michael Robb on June 26."¹⁵

⁹ Declaration of Ponha Lim, CP 93: 1-10; Declaration of Kevin McDaniel, CP 126: 7-16.

¹⁰ Statement of Kevin McDaniel, CP 170; Statement of Ponha Lim, CP 173.

¹¹ Complaint, at CP 15-16, ¶¶ 5.21, 5.25.

¹² *Id.*

¹³ *Id.*, at CP 17-19, ¶¶ 6.1-6.7.

¹⁴ *Id.*, at CP 17:17-19, ¶ 6.4, and CP 18:16-18, ¶ 6.5.

¹⁵ *Id.*, at CP 19:4-5, ¶ 6.6.

The City moved for summary judgment of dismissal, arguing that it owed no duty to Robb under the public duty doctrine, or under §302B of the Restatement (Second) of Torts.¹⁶

The trial court denied the City's motion on March 17, 2009, even though the court ruled that none of the exceptions to the public duty doctrine applied.¹⁷ The trial court held that, notwithstanding the undisputed conclusion that no exception to the public duty doctrine applied, there were sufficient facts to support a finding that the City owed a duty to Robb under Restatement (Second) of Torts §302B:

The question presented by the defendants' Motion for Summary Judgment is whether the allegedly negligent actions of the officers who contacted Samson Berhe and Raymond Valencia on 6/26/05 were affirmative acts negligently performed or more appropriately considered as failures to act. If the latter, then the public duty doctrine bars this action. If the former, then Restatement (Second) of Torts §302B (1965) and comment "a" thereto is applicable and may provide a remedy. It is undisputed that none of the recognized exceptions to the public duty doctrine apply here to allow its use in this negligence action.

Applying the summary judgment standard, the plaintiff has produced sufficient evidence of affirmative acts negligently performed by defendants that a duty may be found to exist

¹⁶ *Id.*, at CP 140:14-146:23.

¹⁷ Order Denying Defendants' Motion For Summary Judgment, at 402: 1-4.

as a matter of law pursuant to Restatement (Second) of Torts §302B.¹⁸

The City sought and was granted discretionary review. Robb has not sought cross-review.

V. ARGUMENT

Standard of review and summary judgment standard. On appeal of summary judgment, the standard of review is *de novo*. The appellate court performs the same inquiry as the trial court. *Lybbert v. Grant Cy.*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Under CR 56, summary judgment should be granted if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. On a motion for summary judgment, the moving party can show the absence of material fact by demonstrating the lack of evidence supporting an essential element of the non-moving party's case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Given such absence, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." 477 U.S. at 322-23. Here, summary judgment

¹⁸ *Id.*, at CP 401:19-402:7 (internal citations omitted).

should have been granted because the City had no actionable duty to Michael Robb in the circumstances of the case. It is immaterial whether a question of fact exists as to another element.

A. This negligence action against the City and its police officers is barred by the public duty doctrine because none of the four exceptions to the doctrine is present.

The threshold determination in a negligence action is whether an actionable duty of care is owed by the defendant to the plaintiff. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 474, 951 P.2d 749 (1998). Whether or not the City owed Robb a duty must be assessed in light of the public duty doctrine.

The public duty doctrine is based upon the policy that the activities of governmental entities undertaken for public benefit should not be discouraged by exposing the government to unlimited liability for individual claims. *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 477 (1988). The doctrine only applies to governmental functions; it does not apply when a government performs a proprietary function. *Borden v. City of Olympia*, 113 Wn.App. 359, 371, 53 P.3d 1020 (2002). Police investigations are quintessential governmental functions. A leading commentator explains:

Ordinarily, a breach of the general duty to prevent criminal acts which police owe to the public does not impose liability upon the employing governmental unit for

damages which particular citizens suffer as a result of the breach. Instead, only where a special duty, *i.e.*, a duty particularized as to an individual, is breached by the police will the municipality be held liable for damages.

18 McQuillin, *The Law of Municipal Corporations* § 53.040.050, at 179 (3d ed.1999) (citing *Osborn v. Mason County*, 157 Wn.2d 18, 134 P.2d 197 (2006)).

The public duty doctrine is summed up in the expression “a duty owed to all is a duty owed to none.” *Beal v. City of Seattle*, 134 Wn.2d 769, 784, 954 P.2d 237 (1998). Under the public duty doctrine, a government entity cannot be liable for negligence *unless* the plaintiff shows that the government breached a duty owed to the individual rather than to the public in general. *Babcock v. Mason Cy. Fire Dist. No. 6*, 144 Wn.2d 774, 785, 30 P.3d 1261 (2001)

It is the exceptions to the public duty doctrine that allow a negligence case to go forward against a public entity that is performing traditional governmental functions. *Osborn v. Mason Cy.*, 157 Wn.2d 18, 27-28, 134 P.3d 197 (2006). The question of whether an exception to the public duty doctrine applies is thus another way of asking whether the public entity had a duty to the plaintiff in a given case. *Taggart v. State*, 118 Wn.2d 195, 218, 822 P.2d 243 (1992).

It was undisputed at the trial court that none of the exceptions to the public duty doctrine apply here.¹⁹

Instead, Robb argued that “the public duty doctrine is irrelevant.” CP 382: 13. Robb is mistaken. The public duty doctrine bars this action because there is no actionable duty unless Robb can establish facts that fit within an exception to the public duty doctrine. Robb has failed to do so.

There are four exceptions to the public duty doctrine under which – and *only* under which – the government acquires a special duty of care to a particular plaintiff or a limited class of potential plaintiffs. *Babcock, supra* at 785-86. These are identified under the rubrics of legislative intent, failure to enforce, the rescue doctrine, and special relationship. *Id.*

Legislative intent exception. There are no statutes or regulations showing that the legislature has sought to identify a class of potential murder victims who enjoy the special protection of the police. Absent such express identification, courts will not infer such legislative intent. *See Ravenscroft v. Wn. Water Power Co.*, 136 Wn.2d 911, 930, 969 P.2d 75 (1998). Statutes that merely establish public entities or confer on them the power to create law enforcement agencies do not protect classes of potential murder victims. *See Johnson v. State*, 77 Wn.App. 934, 938, 894

¹⁹ Order Denying Defendants’ Motion For Summary Judgment, at CP 402:1-3.

P.2d 1366 (1995), (statutes and regulations establishing a campus police force were not intended to identify and protect plaintiff as a member of the college student body). There was no legislation protecting Michael Robb from Samson Berhe. Robb does not claim to come under this exception. CP 382: 10-13.

Failure to enforce exception. Nor is there evidence that the officers' failure to enforce a law resulted in Michael Robb's death. The failure to enforce exception has four elements, each of which must be established by a plaintiff: (1) a statute that protected the victim; (2) violation of that statute; (3) a City employee who had knowledge of the statutory violation; and (4) a City employee who failed to take corrective action required by the statute. *See Honcoop v. State*, 111 Wn.2d 182, 190, 759 P.2d 1188 (1988). The failure to enforce exception is narrowly construed, requiring proof of all elements. *Atherton Condo. Apartment-Owners Ass'n. Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990). In *Honcoop*, for example, dairy operators' claims of ineffective cattle vaccine were dismissed because they could not prove the first element, even though they proved the others. 111 Wn.2d at 189. There is no evidence to establish any of these elements in this case. Robb does not claim to come under this exception. CP 382: 10-13.

Rescue exception. Likewise, the rescue exception is absent because there is no evidence that the police made any assurances that they would protect Michael Robb. The “rescue doctrine” requires both express assurances of assistance and proof of the plaintiff’s reliance on those assurances. *Osborn v. Mason County*, 157 Wn.2d 18, 25, 134 P.3d 197 (2006). A variant of the rescue doctrine is recognized where an injured party reasonably relies on a third party who refrains from acting as a result of the public entity’s assurances. *Chambers-Castanes v. King County*, 100 Wn.2d 275, 286 n. 3, 669 P.2d 451 (1983). See also *Brown v. MacPherson’s, Inc.*, 86 Wn.2d 293, 301-02, 545 P.2d 13 (1975), in which a state employee led an avalanche expert to believe that the state would warn area residents of avalanche dangers, whereupon the expert refrained from issuing warnings he otherwise would have given. The Court of Appeals reversed the trial court’s dismissal for failure to state a claim. *Id.* at 303. But in this case, there is no evidence that any representations were made by the police to someone who thereby refrained from protecting Michael Robb. Robb does not claim to come under this exception. CP 382: 10-13.

Special relationship exception. The special relationship exception requires proof of some direct contact or privity with the injured party (Michael Robb) in which the party reasonably relied on official

representations. *Taylor v. Stevens County*, 111 Wn.2d 159, 166, 759 P.2d 447 (1988). Washington also recognizes a variant of this exception in which a relationship exists between the defendant and a third party (*i.e.*, Samson Berhe), rather than the injured plaintiff. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997). Duty in this circumstance is imposed on one who “takes charge” of another:

One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

Taggart v. State, 118 Wn.2d 195, 219, 822 P.2d 243 (1992). A “take charge” relationship requires a definite, established and continuing connection between the defendant and the third party. *Id.* Thus in *Taggart*, the court found a special relationship between parole officers and the parolees he or she supervises because parole officers have charge and control of their parolees:

Parole officers have the statutory authority under RCW 72.04A.080 to supervise parolees. The State can regulate a parolee's movements within the state, require the parolee to report to a parole officer, impose special conditions such as refraining from using alcohol or undergoing drug rehabilitation or psychiatric treatment, and order the parolee not to possess firearms. The parole officer is the person through whom the State ensures that the parolee obeys the terms of his or her parole. Additionally, parole officers are, or should be, aware of their parolees' criminal histories, and monitor, or should monitor, their parolees'

progress during parole. Because of these factors, we hold that parole officers have “taken charge” of the parolees they supervise for purposes of [Restatement (Second) of Torts] § 319.

Id., at 219-220.^{20,21} In contrast, here the officers had only fleeting contact with Berhe, which contact ended when they released him from questioning. The officers were not supervising or controlling Berhe at the time of the murder.

While it is true that the police had had other contacts with Berhe, a take-charge relationship does not arise from mere repeated contacts, or even necessarily, from prolonged contacts. The State, for example, does

²⁰ *Taggart* cites Restatement (Second) of Torts § 315:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

²¹ Since *Taggart*, Washington has continued to define the class of cases in which a take charge duty exists. For example, in *Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999), the court held that a take charge special relationship extends to probation counselors and pretrial release counselors. *Id.* at 281, 292. The *Hertog* court noted that “[a] probation counselor is clearly in charge of monitoring the probationer to ensure that conditions of probation are being followed, and has a duty to report violations to the court.” *Id.* at 279. Additionally, in *Bishop v. Miche*, 137 Wn.2d 518, 524-31, 973 P.2d 465 (1999), the court held that a county probation officer had a take charge relationship with a probationer who killed a child while driving intoxicated. At the time of the incident, the county probation officer was monitoring the probationer for alcohol use and the probationer was under an order to obey the law for 24 months pursuant to a suspended sentence for driving while intoxicated. *Id.* at 522-23.

not, without more, have a special relationship with dependent children it supervises and thus has no duty to protect others from the dependent children.²² See *Sheikh v. Choe*, 156 Wn.2d 441, 553, 128 P.3d 574 (2006); *Terrell C. v. Dep't of Soc. & Health Servs.*, 120 Wn.App. 20, 29, 84 P.3d 899 (2004). *Terrell C.* declined to impose a duty where DSHS had undertaken supervision of two children who later sexually assaulted a neighbor child. *Id.*, at 29. In concluding there was no take charge relationship, the court explained that social workers did not supervise the children in order to protect others from the children:

The statutory scheme does not contemplate that social workers will supervise the general day-to-day activities of a child. Rather the social worker's role is to coordinate and integrate services in accord with the child's best interests and the need[s] of the family. Any "ongoing" relationship between the social worker and the child is *to prevent future harm to that child, not to protect members of the community from harm.*

Id. at 28, 84 P.3d 899 (emphasis added) (footnote omitted). *Shiekh*, in holding similarly that the State owed no "take charge duty" to protect an

²² In general, special relationships require the placement of an individual in the care of the defendant with the resulting loss of the individual's ability to protect himself or herself. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 44, 929 P.2d 420 (1997) (citing other authority) (affirming dismissal of private group home for developmentally disabled persons in action by resident alleging rape by employee of home). A special relationship is also protective in nature, historically involving an affirmative duty to render aid. The defendant may therefore be required to guard his or her charge against harm from others. *Id.*

assault victim from minors who had been subject to child dependency proceedings, and who were being monitored by DSHS, found:

The mere existence of some ability to control a third party is not the dispositive factor in determining whether a take charge duty exists; rather, the purpose and extent of such control defines the relationship for purposes of tort liability.

156 Wn.2d at 453. The purposes of the officers' interrogation of Berhe was the investigation of residential burglary. The extent was limited, lasting only until Berhe was eliminated as a suspect. CP 170, 173.

The special relationship exception requires that the government have definite, established, continuing charge of an individual, as well as facts showing reasonable reliance. That relationship is different from activity for the public benefit, such as police response to calls for assistance or investigation of neighborhood troublemakers. Six brief police responses over a period of three years, aimed at investigating possible crime, are not sufficient to establish a special relationship between the police and Berhe. If they were, a similar relationship could be urged between the police and every other person they encounter more than once, thus expanding exponentially the City's exposure to tort liability. Not only would this hamper the police in their daily, discretionary investigations and responses to citizen calls, but it would vitiate the special relationship as an *exception* to tort immunity.

Furthermore, Robb does not claim to come under this exception. CP 382: 10-13.

As the trial court noted, it was undisputed that none of the exceptions to the public duty doctrine apply here. CP 402: 1-4. The inquiry into the existence of the City's duty to Robb ends, since, absent duty, all factual questions as to other elements are immaterial. For this reason, the trial court's query as to whether the officers' conduct constituted affirmative acts or omissions does not raise a question of *material* fact. The trial court's error in holding that §302B might provide grounds for liability, depending on how that question is answered, flows from this improper inquiry. Affirmance by this Court would bypass the public duty doctrine. As discussed below, §302B may not properly be invoked to such purpose.

B. Section 302B of the Restatement (Second) of Torts does not itself create a duty and it cannot be applied to the City because the City owes no predicate duty.

The general rule at common law is that a private person does not have a duty to protect others from the criminal acts of third parties. *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 223, 802 P.2d 1360 (1991); Restatement (Second) of Torts §315 (also listing special relationship exception).

Robb argues that §302B of the Restatement (Second) of Torts creates a duty by the City to Robb. That section does not create (or even mention) duty. Instead, that section discusses when an actor's conduct relative to the criminal act of another may be negligent, thereby breaching a duty *if one is owed*:

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

Restatement (Second) of Torts §302B. Because the City has no duty here under the public duty doctrine, inquiry into breach (such as under §302B) is irrelevant and unnecessary to this appeal.

Only when an exception to the public duty doctrine applies (or when a private defendant is found to have some duty) so that an actionable duty exists, may a negligence inquiry proceed to considering whether the defendant's conduct breached the duty. In the case of §302B, a comment to the section further restricts the imposition of liability in that only affirmative acts or a special relationship can lead to a breach of a duty:

There are, however, situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; or where the actor's own

affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account.

Restatement (Second) of Torts §302B comment e (1965).

It is true, as the trial court observed, that §302B distinguishes between affirmative acts and omissions. But it is also true that such distinction cannot serve to create a duty where one does not otherwise exist:

This Section is concerned only with the negligent character of the actor's conduct, and not with his duty to avoid the unreasonable risk. In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act. The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relation between the actor and the other which gives rise to the duty.... If the actor is under no duty to the other to act, his failure to do so may be negligent conduct within the rule stated in this Section, but it does not subject him to liability, because of the absence of duty.

Restatement (Second) of Torts §302 comment a (1965) (emphasis added).²³

²³ "Section 302B is a special subsection of section 302. The comments pertaining to section 302 thus apply to section 302B." *Parrilla v. King Cy.*, 138 Wn.App. 427, 438 n.6, 157 P.3d 879 (2007).

Thus, Section 302B analysis *presupposes* that a duty exists. For this reason, the question of whether the officers acted affirmatively or failed to act at all is meaningless without the predicate showing of a recognized duty to Michael Robb.²⁴ But that is the very matter at issue on this appeal, and cannot be resolved by *a priori* application of §302B. Stated otherwise, unless Robb overcomes the immunity conferred by the public duty doctrine, §302B will not impose liability on the City *even if* Robb could establish evidence of an affirmative act performed negligently.

²⁴ Even if an exception to the public duty doctrine existed, plaintiff cannot meet the requirements of Section 302B, having failed to allege or submit evidence of an affirmative act. Plaintiff neither pleaded nor alleged any affirmative acts. Robb pleaded three *omissions*. Robb argued below that the burglary interrogation was “the affirmative act” because it happened to be the chronological context in which alleged *omissions* occurred. But “context” is not an affirmative, physical act. Neither is a decision not to act. An impact on the physical world defines an “act”:

1. Something done or performed, esp. voluntarily; a deed. — Also termed *action*.
2. The process of doing or performing; an occurrence that results from a person's will being exerted on the external world.

Black's Law Dictionary (8th ed. 2004). In contrast, “omission” is defined as leaving something out, as here when the officers omitted to arrest, warrant-check, or confiscate the shotgun shells:

1. A failure to do something; esp., a neglect of duty.
2. The act of leaving something out.
3. The state of having been left out or of not having been done.
4. Something that is left out, left undone, or otherwise neglected.

Id. If omissions can be viewed as affirmative acts, the distinction in §302B becomes meaningless.

Of the few Washington cases that address §302B, only one involved a public entity defendant, and that case is inapposite. Nevertheless Robb placed great weight on this case – which did not even mention the public duty doctrine. In *Parrilla v. King Cy.*, 138 Wn.App. 427, 438 n.6, 157 P.3d 879 (2007), this Court was presented with the question of a county's possible liability when a deranged passenger took control of a bus which the driver had left with the engine running and the deranged passenger inside.²⁵ But the public duty doctrine did not apply in *Parrilla* because the county was engaged in the *proprietary* function of providing bus service rather than a *governmental* function such as police activity. See *Stiefel v. City of Kent*, 132 Wn.App. 523, 132 P.3d 1111 (2006) (public duty doctrine applies only when the public entity is performing a governmental function); *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 370, 89 P.3d 217 (2004) (citing other authority) (general police power is strongly linked to a municipality's governmental function). The county in *Parrilla* had a duty (the same duty owed by private bus services) to operate its bus safely. The county, unlike

²⁵ The court reversed the trial court's dismissal, holding under §302B that, assuming the truth of plaintiffs' averments, the driver's *affirmative act* of leaving the bus with the engine running, with only the violent, deranged person aboard, exposed others to the foreseeable harm as the passenger drove the bus into other vehicles. 138 Wn.App. at 440-41. The Court of Appeals remanded for trial. *Id.*, at 443.

the City here (which is immunized by the public duty doctrine), owed an actionable duty. Thus, *Parrilla* provides no support for Robb's argument.

No Washington cases apply §302B to police action, or even to any other governmental function. Only two cases nationally could be found addressing the issue, and both favor the City.

The Supreme Court of Utah has specifically held that a public entity *cannot* be liable under §302B unless the special relationship exception to the public duty doctrine applies:

The court of appeals determined that the governmental actor's affirmative act of directing students to traverse the icy sidewalk permitted the court to sidestep the entire special relationship question. This attempt to sidestep was a misstep. As we explained earlier, governmental actors are not accountable for their affirmative acts unless a special relationship is present. *Day [v. State]*, 1999 UT 46, ¶ 13, 980 P.2d 1171 [(Utah 1999)] This concept is the essence of the "public duty doctrine." *Id.* ¶ 12. Without a special relationship, the University owed no duty to Mr. Webb. The discovery of an affirmative act could not create one by itself.

Webb v. University of Utah, 125 P.3d 906 (Utah 2005).

Officers must have discretion to apprehend criminals in order to protect the public generally. This often involves questioning suspects, making custodial stops, and, when necessary, detaining individuals without arrest. Officers frequently question persons known to them, through past contacts, to be involved, directly or indirectly, in criminal

activities. *See, e.g., State v. Lesnick*, 84 Wn.2d 940, 954-55, 530 P.2d 243 (1975) (practical necessities of effective law enforcement contemplate routine informal detaining of suspects without arrest). To impose a duty of care to an unknown future victim of one who has had such contacts with the police, where the elements of a public duty doctrine exception are not present, would greatly expand governmental liability for an essential governmental function. But it is precisely the purpose of the public duty doctrine to *limit* the City's liability in such circumstances. *See supra*, at pages 6-8. Moreover, finding a new duty of the police to protect future victims in such circumstances imposes substantial burdens on the police in their everyday work.

The Illinois Court of Appeals has considered this question in the context of a suit by a witness who was assaulted by bystanders near the scene of a crime after he identified the criminal suspect, and was left at the scene after he requested transport. In *Poliny v. Soto*, 178 Ill. App.3d 203, 533 N.E.2d 15 (1988), the court affirmed dismissal of the officers and city, holding that no exception to the Illinois public duty doctrine applied:

Were we to hold, as plaintiff contends, that the police owe a duty to provide protection to all foreseeable witnesses from other bystanders at the scene of a crime or at a location "nearby" after the arrest of a perpetrator of a crime, the police would be placed in the position of being insurers of the personal safety of those witnesses, whether they asked for protection or not. We further observe that

the likelihood of injury to such witnesses is highly speculative and the burden of guarding against it onerous, if not impossible. At a minimum, police officers necessarily would be pressed to seek out at the time of a crime all witnesses and determine if they were threatened or might be threatened, which would require the police to attempt to draw fine lines of what might constitute legitimate threats, consume time from other calls where their presence may be immediately required, and severely curtail their discretion in setting priorities in the efficient performance of their duties. To place such a burden on law enforcement would be clearly untenable.

178 Ill.App.3d at 209-210.

This Court should adopt the reasoning of *Webb* and *Poliny*. The public duty doctrine allows police officers to use discretion in the performance of their public duties, without undue constraints of future lawsuits. The existence of §302B, in delineating the character of an actor's negligent conduct, does not purport to create or alter governmental duties. The City *cannot* be liable under §302B because no exception to the public duty doctrine applies. Thus, Robb cannot get past the duty element of a negligence cause of action.

VI. CONCLUSION

The provision of police protection is the quintessential governmental function. In their daily work, police officers make innumerable discretionary decisions regarding the investigation of threats to the public and the apprehension of suspects. The purpose of the public

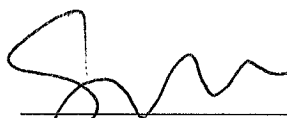
duty doctrine is to shield governments from tort liability regarding that work. The exceptions to the public duty doctrine have been crafted by the courts to strike a balance between the need to protect governments from unlimited tort liability, and citizens' right to obtain relief in meritorious claims against governments.

Affirmance of the decision below would upset that balance by expanding the City's liability, even though it is undisputed that no exception to the public duty doctrine exists here. The City urges this Court to reverse the trial court and to hold that §302B does not impose a duty on the City. No exception to the public duty doctrine applies. Thus, plaintiff's lawsuit must be dismissed.

DATED this 12th day of October, 2009.

THOMAS A. CARR
Seattle City Attorney

By:



SUZANNE K. PIERCE, WSBA #22733
Assistant City Attorney

Attorneys for Appellants, City of Seattle,
Officer Kevin McDaniel
& Officer Ponha Lim

PROOF OF SERVICE

SAMANTHA SAMS certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am employed as a Legal Assistant with the Seattle City Attorney's office.

On October 12, 2009, I requested ABC Legal Messengers to serve a copy of this document upon the following counsel:

Attorneys for Appellees:

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Seattle, WA 98104

I further state that I requested ABC Messengers to file, by October 12, 2009, the original of this document with the Court of Appeals, Division I.

DATED this 12th day of October, 2009.



SAMANTHA SAMS

Westlaw.

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(Cite as: 125 P.3d 906)

H

Supreme Court of Utah.
James WEBB, Plaintiff and Respondent,

v.

The UNIVERSITY OF UTAH, a division of the
State of Utah, Park Plaza Condominium Owners'
Association, a Utah nonprofit corporation, and Jon-
ette Webster, Defendants and Petitioner.

No. 20040282.

Nov. 15, 2005.

Background: Student brought negligence action against state university after he slipped and fell on icy sidewalk while on university-sponsored and course-required field trip. The Third District Court, Salt Lake Department, Pat B. Brian, J., granted the university's motion to dismiss the action. Student appealed, and the Court of Appeals, 88 P.3d 364, reversed and remanded. University petitioned for certiorari.

Holdings: The Supreme Court, Nehring, J., granted certiorari and held that:

- (1) instructor's direction to occupy and traverse sidewalk, absent a special relationship, did not create a duty, and
- (2) instructor did not exert control necessary to create a special relationship when instructor issued directive to occupy and traverse sidewalk.

Reversed.

West Headnotes

[1] Certiorari 73 ⚡64(1)

73 Certiorari

73II Proceedings and Determination

73k63 Review

73k64 Scope and Extent in General

73k64(1) k. In General. Most Cited

Cases

When reviewing cases under certiorari jurisdiction,

the Supreme Court applies a standard of correctness to the decision made by the court of appeals rather than the trial court.

[2] Negligence 272 ⚡202

272 Negligence

272I In General

272k202 k. Elements in General. Most Cited Cases

To establish a claim of negligence, the plaintiff must establish four essential elements: (1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, (3) that the breach of duty was the proximate cause of the plaintiff's injury, and (4) that the plaintiff in fact suffered injuries or damages.

[3] Negligence 272 ⚡210

272 Negligence

272II Necessity and Existence of Duty

272k210 k. In General. Most Cited Cases

Negligence 272 ⚡214

272 Negligence

272II Necessity and Existence of Duty

272k214 k. Relationship Between Parties.

Most Cited Cases

Duty arises out of the relationship between the parties and imposes a legal obligation on one party for the benefit of the other party.

[4] Negligence 272 ⚡211

272 Negligence

272II Necessity and Existence of Duty

272k211 k. Public Policy Concerns. Most Cited Cases

A court's conclusion that duty does or does not exist is an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is or is not entitled to protection.

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[5] Negligence 272 ⚡210

272 Negligence
272II Necessity and Existence of Duty
272k210 k. In General. Most Cited Cases

Torts 379 ⚡109

379 Torts
379I In General
379k109 k. Duty and Breach Thereof in General. Most Cited Cases
As a general proposition of tort law, the distinction between acts and omissions is central to assessing whether a duty is owed a plaintiff.

[6] Negligence 272 ⚡214

272 Negligence
272II Necessity and Existence of Duty
272k214 k. Relationship Between Parties. Most Cited Cases
The essence of a special relationship giving rise to a duty is dependence by one party upon the other or mutual dependence between the parties.

[7] Municipal Corporations 268 ⚡723

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k723 k. Nature and Grounds of Liability. Most Cited Cases

Negligence 272 ⚡214

272 Negligence
272II Necessity and Existence of Duty
272k214 k. Relationship Between Parties. Most Cited Cases
When used in the context of ordinary negligence, a "special relationship" is what is required to give rise to a duty to act, whereas the existence of a special relationship relating to a governmental actor can result in the imposition of liability for either her acts or her failure to act.

[8] Negligence 272 ⚡214

272 Negligence
272II Necessity and Existence of Duty
272k214 k. Relationship Between Parties. Most Cited Cases
A presence or an absence of a special relationship for negligence purposes is not determined by titles or job descriptions; nor is the presence or absence of a special relationship immutable.

[9] Municipal Corporations 268 ⚡723

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k723 k. Nature and Grounds of Liability. Most Cited Cases
A governmental actor can create a special relationship, where one did not previously exist, by her acts.

[10] Municipal Corporations 268 ⚡723

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k723 k. Nature and Grounds of Liability. Most Cited Cases
The commission of an affirmative act by a governmental actor does not lead directly to the duty question as it would in the case of a non-governmental actor, but instead provides relevant information about whether a special relationship existed between the governmental actor and the injured party requiring the imposition of a legal duty on the governmental actor.

[11] Negligence 272 ⚡210

272 Negligence
272II Necessity and Existence of Duty
272k210 k. In General. Most Cited Cases

Negligence 272 ⚡214

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272 Negligence

272II Necessity and Existence of Duty

272k214 k. Relationship Between Parties.

Most Cited Cases

Generally, the duty to protect is allied with the failure-to-act element of general negligence law; the duty of a private citizen to act in aid of another, the duty to protect, arises only where a special relationship is found to exist. Restatement (Second) of Torts § 314A.

[12] Negligence 272 ⚡210

272 Negligence

272II Necessity and Existence of Duty

272k210 k. In General. Most Cited Cases

Under ordinary negligence principles, the duty-to-protect concept has no application where a duty arises from an affirmative act.

[13] Municipal Corporations 268 ⚡723

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k723 k. Nature and Grounds of Liability. Most Cited Cases

Once a special relationship is found, the governmental actor's duty not to act negligently follows; this duty encompasses both acts and failures to act.

[14] Colleges and Universities 81 ⚡5

81 Colleges and Universities

81k5 k. Powers, Franchises, and Liabilities in General. Most Cited Cases

State university employee's affirmative act of directing students to traverse the icy sidewalk while on school-organized curriculum-related field trip did not, absent a special relationship, create a duty toward student who suffered injuries when another person grabbed student while slipping on sidewalk.

[15] Municipal Corporations 268 ⚡723

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k723 k. Nature and Grounds of Liability. Most Cited Cases

Governmental actors are not accountable for their affirmative acts unless a special relationship is present.

[16] Colleges and Universities 81 ⚡5

81 Colleges and Universities

81k5 k. Powers, Franchises, and Liabilities in General. Most Cited Cases

State university personnel do not generally have a special relationship with students.

[17] Colleges and Universities 81 ⚡5

81 Colleges and Universities

81k5 k. Powers, Franchises, and Liabilities in General. Most Cited Cases

A college instructor who has no special relationship with her class members in a benign academic setting can create a special relationship for negligence purposes by altering the academic environment.

[18] Colleges and Universities 81 ⚡5

81 Colleges and Universities

81k5 k. Powers, Franchises, and Liabilities in General. Most Cited Cases

State university instructor's directive to students during school-organized curriculum-related field trip to occupy and traverse icy sidewalks did not reasonably induce students to rely on the directive such that a student could prevail on a negligence claim against the university for injuries suffered when another person grabbed student while slipping on sidewalk; it was unreasonable for a student to rely on the directive given the dangerous nature of the sidewalks and the directive's tangential relationship to the field trip's academic mission.

*907 Brent Gordon, Salt Lake City, for respondent.

Mark L. Shurtleff, Att'y Gen., Debra J. Moore, Sandra L. Steinvort, Asst. Att'ys Gen., Salt Lake

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City, for petitioner.

On Certiorari to the Utah Court of Appeals

NEHRING, Justice:

INTRODUCTION

¶ 1 We granted certiorari to review the court of appeals' holding that the University of Utah owed Mr. Webb a "duty to exercise ordinary and reasonable care when it directs students to engage in specific activities as *908 part of its educational instruction." We reverse.

BACKGROUND^{FN1}

FN1. All facts are taken from *Webb v. University of Utah*, 2004 UT App 56, 88 P.3d 364.

¶ 2 Mr. Webb was a University of Utah student enrolled in an earth sciences class. As part of the required course curriculum, Mr. Webb attended a field trip to a condominium complex to examine fault lines in the Salt Lake County area. Mr. Webb and other students were directed to walk on icy and snowy sidewalks through the condominium complex. While Mr. Webb was standing on a complex sidewalk, a fellow student slipped and grabbed Mr. Webb for support, causing him to fall and sustain injuries.

¶ 3 Mr. Webb sued the University of Utah and others. He alleged the University was negligent in directing students to occupy and traverse the condominium sidewalks on a school-organized, curriculum-related field trip. The University filed a rule 12(b) motion to dismiss on the grounds that no special relationship existed between Mr. Webb and the University and, therefore, the University owed Mr. Webb no duty. The trial court granted the University's motion and dismissed Mr. Webb's claims

against it. Mr. Webb appealed.

¶ 4 The court of appeals reversed. The court held that the allegations in Mr. Webb's complaint adequately described a legal duty owed by the University to Mr. Webb. This duty was not one based on a special relationship, but rather a general negligence duty to "exercise ordinary and reasonable care when directing its students to take a certain route on a required field trip." The court of appeals was drawn to this characterization of the University's duty because it interpreted the allegation that Mr. Webb's instructor required the class to enter a dangerous area on a required school field trip to mean that the University had committed an affirmative act, thereby eliminating the need for the existence of a special relationship as a predicate for the creation of a duty. The court summarized its reasoning in its comment that "the University does owe a duty to exercise ordinary and reasonable care when it affirmatively acts in directing its students to perform certain tasks as part of its curriculum." *Webb v. Univ. of Utah*, 2004 UT App 56, 88 P.3d 364. Despite its determination that the University owed Mr. Webb an ordinary negligence duty, it was unwilling to concede the absence of a special relationship, noting that "were a special relationship required in this case, the facts alleged by Webb are sufficient to establish a special relationship." *Id.*

¶ 5 The University of Utah sought certiorari review to decide whether (1) the court of appeals erred in holding that, in the absence of a special relationship, the University can be held liable in negligence for injury sustained by a student on a field trip and (2) whether the court of appeals erred in concluding that the allegations of the complaint suffice to establish a special relationship between Webb and the University.

STANDARD OF REVIEW

[1] ¶ 6 "When reviewing cases under certiorari jurisdiction, we apply a standard of correctness to the decision made by the court of appeals rather than

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the trial court.” *Brigham City v. Stuart*, 2005 UT 13, ¶ 7, 122 P.3d 506.

ANALYSIS

¶ 7 The central challenge confronting us in this case is to make sense of the scene where common law negligence and governmental immunity law have collided. The court of appeals took on the same task. *Webb v. Univ. of Utah*, 2004 UT App 56, 88 P.3d 364. Although we disagree with the outcome of its effort, we attribute our decision to reach a different result to our conflicting readings of confusing cross-currents of tort law. The court of appeals' holding turns on the premise that, irrespective of the existence of legal forces that shape the tort liability of governmental entities, such as the public duty doctrine, the special relationship doctrine, and the governmental immunity statutes, an affirmative act by a governmental actor triggers the application of the general duty to act reasonably in the circumstances. *Id.* ¶¶ 6, 8. In the view of the court of appeals, where an affirmative act by a governmental actor is *909 found, all other considerations must yield. *Id.*

¶ 8 The court of appeals buttressed its holding by stating that even if a special relationship was necessary to establish liability, that relationship could be present in the relationship between the University actor and Mr. Webb. We now explain why neither of these grounds for the court of appeals' holding is viable.

I. THE SPECIAL RELATIONSHIP AS A SOURCE OF DUTY

[2][3][4] ¶ 9 To establish a claim of negligence, the “plaintiff must establish four essential elements: (1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, (3) that the breach of duty was the proximate cause of the plaintiff's injury, and (4) that the plaintiff in fact suffered injuries or damages.” *Hunsaker v. State*, 870 P.2d 893, 897 (Utah 1993) (citations omitted).

“Duty arises out of the relationship between the parties and imposes a legal obligation on one party for the benefit of the other party.” *Delbridge v. Maricopa County Cmty. Coll. Dist.*, 182 Ariz. 55, 893 P.2d 55, 58 (1994). “A court's conclusion that duty does or does not exist is ‘an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is [or is not] entitled to protection.’ ” *Univ. of Denver v. Whillock*, 744 P.2d 54, 57 (Colo.1987) (quoting *Prosser and Keeton on the Law of Torts* § 53, at 358 (5th ed.1984)).

[5][6] ¶ 10 The court of appeals correctly observed that as a general proposition of tort law, the distinction between acts and omissions is central to assessing whether a duty is owed a plaintiff. *Webb*, 2004 UT App 56, ¶ 6 n. 3, 88 P.3d 364; see also Restatement (Second) of Torts § 302 (1965). In almost every instance, an act carries with it a potential duty and resulting legal accountability for that act. By contrast, an omission or failure to act can generally give rise to liability only in the presence of some external circumstance—a special relationship. Restatement (Second) of Torts § 314A (1965). The Restatement describes the following as examples of special relationships: common carrier to its passenger, innkeeper and guest, landowner and invitees to his land, and one who takes custody of another. *Id.* As we have explained, “[t]hese relationships generally arise when one assumes responsibility for another's safety or deprives another of his or her normal opportunities for self-protection.” *Beach v. Univ. of Utah*, 726 P.2d 413, 415 (Utah 1986). The “essence of a special relationship is dependence by one party upon the other or mutual dependence between the parties.” *Id.* (citations omitted).

¶ 11 In situations not involving governmental actors, the duality between omission and action serves as a workable analytical tool. In the realm of governmental actors, however, matters change. In a fundamental way, governmental actors owe a duty to the public at large or at least to that segment of the public which visits the particular realm of re-

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sponsibility served by the governmental actor. In a very real sense, the professional lives of governmental actors are comprised of an unending sequence of actions and failures to act that in many instances can directly affect the health, safety, and general well-being of citizens. As a matter of public policy, we do not expose governmental actors to tort liability for all mishaps that may befall the public in the course of conducting their duties. *Day v. State*, 1999 UT 46, ¶ 10, 980 P.2d 1171. Doing otherwise would have the likely effect of reducing the pool of potential public servants. Our search for sound public policy has led us, however, to decide that governmental actors should be answerable in tort when their negligent conduct causes injury to persons who stand so far apart from the general public that we can describe them as having a special relationship to the governmental actor. *Id.* ¶¶ 12-13.

¶ 12 The use of the special relationship label to describe persons who may be entitled to recover in tort from governmental actors is a potential source of confusion because it is the same nomenclature that the law uses to describe the class of persons who may be owed a duty arising from another's failure to act under general tort law principles. See *Black's Law Dictionary* 1405 (7th ed.1999) (defining special relationship as "[a] nonfiduciary relationship having an element of trust, arising [especially] when one person *910 trusts another to exercise a reasonable degree of care" and defining special-relationship doctrine as "[t]he theory that if a state has assumed control over an individual sufficient to trigger an affirmative duty to protect that individual, then the state may be liable for harm inflicted on the individual"). Thus, identical terminology is used to describe two tort concepts that, while very different, occupy domains just close enough to one another to promote confusion.

[7] ¶ 13 "Special relationship" therefore has two meanings: one applicable to the general tort duty analysis, the other defining the necessary predicate to the creation of a duty in a governmental actor. *Id.*

As noted above, when used in the context of ordinary negligence, a special relationship is what is required to give rise to a duty to act, whereas the existence of a special relationship relating to a governmental actor can result in the imposition of liability for either her acts or her failure to act.

[8][9][10] ¶ 14 A presence or an absence of a special relationship is not determined by titles or job descriptions. Nor is the presence or absence of a special relationship immutable. A governmental actor can create a special relationship, where one did not previously exist, by her acts. Thus the commission of an affirmative act by a governmental actor does not lead directly to the duty question as it would in the case of a non-governmental actor, but instead provides relevant information about whether a special relationship existed between the governmental actor and the injured party requiring the imposition of a legal duty on the governmental actor. *Day*, 1999 UT 46, ¶ 13, 980 P.2d 1171.

[11][12][13] ¶ 15 Much of the confusion surrounding the concept of the special relationship can be traced to the easily misapprehended "duty to protect" concept. Generally, the duty to protect is allied with the failure-to-act element of general negligence law. The duty of a private citizen to act in aid of another, the duty to protect, arises only where a special relationship is found to exist. Restatement (Second) of Torts § 314A. Similarly, under ordinary negligence principles, the duty-to-protect concept has no application where a duty arises from an affirmative act. Once a special relationship is found, the governmental actor's duty not to act negligently follows. *Id.* This duty encompasses both acts and failures to act. *Id.*

[14][15] ¶ 16 How does this explanation of the special duty problem play itself out in Mr. Webb's case? The court of appeals determined that the governmental actor's affirmative act of directing students to traverse the icy sidewalk permitted the court to sidestep the entire special relationship question. This attempt to sidestep was a misstep. As we explained earlier, governmental actors are not

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accountable for their affirmative acts unless a special relationship is present. *Day*, 1999 UT 46, ¶ 13, 980 P.2d 1171. This concept is the essence of the "public duty doctrine." *Id.* ¶ 12. Without a special relationship, the University owed no duty to Mr. Webb. The discovery of an affirmative act could not create one by itself.

¶ 17 We turn now to the court of appeals' fallback position: that the governmental actor had a special relationship with Mr. Webb. Where did this relationship come from, and what made it "special"? According to the court of appeals, the special relationship was created by the degree of control exercised by the university actor over the class. He told them to walk on the snow- and ice-covered sidewalk. The sidewalk's surface was dangerous-at least in hindsight. The court of appeals determined that by using his authority to put the class in peril, the university actor created a special relationship with the class members.

¶ 18 How do we know when a situation is perilous enough to create a special relationship? The court of appeals says the situation that Mr. Webb's class faced was "fraught with unreasonable risk." Thus, the questions that may be asked include, as pleaded and indulging it all the inferences to which it is entitled, did Mr. Webb's complaint allege facts from which it could be concluded that, as a matter of law, the university actor exercised such control over the class as to expose them to an unreasonable risk of injury on the sidewalk? We hold that it did not.

*911 [16] ¶ 19 University personnel do not generally have a special relationship with students. *Freeman v. Busch*, 349 F.3d 582, 587 (8th Cir.2003). "The general question of whether university school officials and students have a 'special relationship' such that there is an affirmative duty to protect and keep free from foreseeable harm ... has not been addressed by the United States Supreme Court." *Apffel v. Huddleston*, 50 F.Supp.2d 1129, 1132 (D.Utah 1999). However, a number of jurisdictions and academic publications have endorsed the view

that "since the late 1970s, the general rule is that no special relationship exists between a college and its own students because a college is not an insurer of the safety of its students." *Freeman*, 349 F.3d at 587. This follows the modern presumption that a university does not stand in loco parentis to its student body and it does not have a "special custodial duty" to its student body. *Id.*

¶ 20 We relied on that theme in our analysis and holding in *Beach v. University of Utah*, 726 P.2d 413 (Utah 1986), which also involved a University student who sustained injuries on a school-related field trip, which she claimed were due to negligence on the part of the University and the breach of her special relationship with the University. Ms. Beach participated in an off-campus, University-sponsored field trip; at a dinner event she became intoxicated and, after she was transported back to the campground, wandered off, fell down a cliff, and sustained permanent physical injuries. She sued the University, alleging that a special relationship existed between the institution, her professor, and herself. She alleged the special relationship gave rise to an affirmative duty on the part of the instructor to supervise and protect her.

¶ 21 The *Beach* court began its analysis as we have today. An essential element of a negligent action is that the defendant owes a duty of reasonable care to the plaintiff. *Id.* at 415. Absent a showing of duty, a plaintiff cannot recover. *Id.* The *Beach* court held that "[o]rdinarily, a party does not have an affirmative duty to care for another." *Id.* Ms. Beach claimed, however, that the University and her instructor owed her an affirmative duty. Ms. Beach bolstered her argument with the claim that her instructor, through a prior experience with Ms. Beach on another field trip, "knew or should have known of her propensity to become disoriented after drinking," and therefore, "the University had a special duty to supervise her on the evening in question." *Id.* at 416.

¶ 22 We turned away Ms. Beach's arguments and held that the University owed her no duty. We

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reasoned that the prior field trip to Lake Powell in which Ms. Beach "became dizzy when she reached the bushes after leaving the rest of the company" provided nothing "within [the instructor's] sight that would have alerted [him] ... to the fact that she had a tendency to become dizzy or disoriented when she consumed alcohol." *Id.* Thus the earlier field trip was "not determinative of whether a special relationship arose." *Id.* The *Beach* court found no characteristics of a special relationship between Ms. Beach and the University or her instructor. As a result, the court concluded that "[b]ecause no special relationship existed, the University had no affirmative obligation to protect or supervise her and no duty was breached." *Id.*

[17] ¶ 23 Despite the result in *Beach*, we are persuaded that a college instructor who has no special relationship with her class members in a benign academic setting can create a special relationship by altering the academic environment. We think that it is therefore possible for an instructor to sit in her office and plan a field trip to a domesticated destination like a condominium project without creating a special relationship, but can create a special relationship later upon arriving on the scene to find that the actual setting is not, in fact, domesticated, but perilous.

¶ 24 The hypothetical possibility that a special relationship can be created between an instructor and a student in a higher education setting flows from the fundamental reality that despite the relative developmental maturity of a college student compared to, say, a pre-schooler, a college student will inevitably relinquish a measure of behavioral autonomy to an instructor out of deference to her superior knowledge, skill, and experience.*912 This is a phenomenon that should, and certainly does, at least unconsciously guide all decisions made by instructors relating to the selection of an environment for learning.

¶ 25 The harder question is to determine how much loss of autonomy a student must sustain and how much peril must be present to establish a special re-

lationship. We are not prepared to endorse the State's position that every college student is responsible for his own protection in any school-related activity, regardless of the risk. The experience of courts in other jurisdictions gives us ample reason to leave open the possibility that a special relationship may emerge from the university-student relationship. For example, universities have been held liable for school-related accidents involving assaults in student dormitories and fraternity hazing incidents. *Furek v. Univ. of Delaware*, 594 A.2d 506 (Del.1991); *Mullins v. Pine Manor Coll.*, 389 Mass. 47, 449 N.E.2d 331 (1983). Some have also rejected university liability if the student assumed what was a clearly identifiable and obvious danger. See *Breher v. Catholic Univ. of Am.*, No. 88-3328-OG, 1989 WL 1124134, at *1-3, 1989 U.S. Dist. LEXIS 14029, at *3-8 (D.D.C. Nov.22, 1989) (the plaintiff sued the University after fracturing her ankle in an intramural touch football game. *Id.* at *1, 1989 U.S. Dist. LEXIS 14029, at *3-4. The plaintiff admitted the field was drenched and muddy from a prior rain storm. *Id.* at *2-3, 1989 U.S. Dist. LEXIS 14029, at *7. The court held that "[t]here are situations in which the danger is so patent or well known that, as a matter of law, a participant assumes the risk." *Id.* at *3, 1989 U.S. Dist. LEXIS 14029, at *8. The court found the plaintiff had knowledge and appreciation of the risk and voluntarily assumed that risk, and therefore, the university was not negligent, *id.* at *4-5, 1989 U.S. Dist. LEXIS 14029, at *14). But see *Brigham Young Univ. v. Lillywhite*, 118 F.2d 836, 841-43 (10th Cir.1941) (where the court concluded the university instructor was negligent to a student for her injuries sustained by the instructor's failure to properly supervise students conducting experiments in the chemistry lab). One method to aid us in approaching the autonomy question is using the special relationship factors set out in *Day v. State*, 1999 UT 46, 980 P.2d 1171. In *Day* we squarely faced the question of special relationship formation:

A special relationship can be established (1) by a statute intended to protect a specific class of per-

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sons of which the plaintiff is a member from a particular type of harm; (2) when a government agent undertakes specific action to protect a person or property; (3) by governmental actions that reasonably induce detrimental reliance by a member of the public; and (4) under certain circumstances, when the agency has actual custody of the plaintiff or of a third person who causes harm to the plaintiff.

Id. ¶ 13.

¶ 26 The third *Day* factor, that a special relationship may be created "by governmental actions that reasonably induce detrimental reliance by a member of the public," is relevant here. *Id.* A directive received in connection with a college course assignment is an act that would engage the attention of the prudent student. There are practical reasons for this. Students want to please their instructors. They want to succeed in their studies. They believe that the instructors have command of the subject matter and the environment in which it is taught. Many of these directives would be logical candidates to induce the kind of detrimental reliance we contemplated in *Day*.

[18] ¶ 27 It is certainly possible that a directive inducing detrimental reliance may be one that creates an unreasonable risk of harm to the people expected to follow it. Viewed objectively, we conclude that the directive to occupy and traverse the condominium sidewalk does not meet this standard. We reach this conclusion for several reasons. First, the directive given Mr. Webb's class did not relate directly to the academic enterprise of the class. By this we mean that it is not reasonable to believe that any student would understand that his academic success, measured either by the degree of knowledge acquired or by the positive impression made on the instructor, turned on whether they abandoned all internal signals of peril to take a particular potentially hazardous route to *913 view fault lines. Put in the language of *Day*, the directive's tangential relationship to the field trip's academic mission leaves us with the firm conviction that it would not be reas-

onable for a student to rely on it. The instructor did not, therefore, exert the control which might be present in an academic setting to create a special relationship.

CONCLUSION

¶ 28 Because the University's directive to Mr. Webb to traverse the sidewalk was insufficient to create a special relationship with him and a legal duty to him, we reverse the judgment of the court of appeals.

¶ 29 Chief Justice DURHAM, Associate Chief Justice WILKINS, Justice DURRANT, and Justice PARRISH concur in Justice NEHRING's opinion. Utah, 2005.

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178 Ill.App. 203, 1913 WL 2122 (Ill.App. 1 Dist.)
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C

Appellate Court of Illinois, First District.

Fred Bender, Appellee,

v.

The Bender Store & Office Fixture Company and

Julius A. Stone, Appellants.

Gen. No. 19,158.

March, 1913.

West Headnotes

Trademarks 382T 1428(1)

382T Trademarks

382TVIII Violations of Rights

382TVIII(A) In General

382Tk1423 Particular Cases, Practices, or Conduct

382Tk1428 Passing Off or Palming Off

382Tk1428(1) k. In General. Most

Cited Cases

(Formerly 382k486)

Where the use of a name selected by a corporation results in the palming off of the corporation's goods on the public as the goods of another, the use of the name will be enjoined.

Trademarks 382T 1526

382T Trademarks

382TVIII Violations of Rights

382TVIII(D) Defenses, Excuses, and Justifications

382Tk1521 Justified or Permissible Uses

382Tk1526 k. Use of Own Name.

Most Cited Cases

(Formerly 382k488)

The fact that the state issues a charter to a corporation by a certain name does not give to such corporation a right to use it if it was deliberately chosen or is used for the purpose of deceiving the public, and thereby appropriating the business of another.

Trademarks 382T 1111

382T Trademarks

382TIII Similarity Between Marks; Likelihood of Confusion

382Tk1111 k. Intent; Knowledge of Confusion or Similarity. Most Cited Cases

(Formerly 382k488)

When a name is selected by a corporation for purpose of deceiving the public into the belief that its goods are those of another, the use of the name for that means will be enjoined.

Trademarks 382T 1111

382T Trademarks

382TIII Similarity Between Marks; Likelihood of Confusion

382Tk1111 k. Intent; Knowledge of Confusion or Similarity. Most Cited Cases

(Formerly 382k488)

Where bill alleged that defendant corporation had adopted name of complainant which he used in connection with his business and engaged in same business for purpose of defrauding and cheating the public and inducing complainant's customers to deal and trade with corporation in the belief that they were dealing with complainant, interlocutory injunction was properly ordered.

Corporations 101 45

101 Corporations

101III Corporate Name

101k45 k. Names Which May Be Adopted. Most Cited Cases

Persons seeking to form a corporation may ordinarily choose any name their fancy dictates, subject to the rule that they may not choose the name of a corporation already existing, or one that is to be used to deceive the public, or to be passed off for that of some other person or firm in business.

Corporations 101 49(1)

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101 Corporations

101III Corporate Name

101k49 Use of Similar Name by Others

101k49(1) k. Corporations Engaged in Business. Most Cited Cases

Persons seeking to form a corporation may not choose the name of a corporation already existing.

Evidence 157 68

157 Evidence

157II Presumptions

157k68 k. Consequences of Acts or States of Fact. Most Cited Cases

Every sane person is presumed to intend the natural and probable as well as the inevitable results of his deliberate acts in spite of his assertions to the contrary.

*1 Appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1912. Affirmed. Opinion filed March 13, 1913. SAMUEL G. GRODSON and BLUM & BLUM, for appellants.

D'ANCONA & PFLAUM, for appellee.

MR. JUSTICE GRAVES delivered the opinion of the court.

This is an appeal from an interlocutory injunction order, restraining The Bender Store & Office Fixture Company, a corporation, and one Julius A. Stone, who was the president of the corporation, and their attorneys, clerks, employes and servants, and all persons claiming through or under them from using the word "Bender" in connection with the business of selling store and office furniture.

The bill made the basis of the order was filed by one Fred Bender and was duly verified. It is averred in the bill, in substance, that appellee is and for many years has been in the business of selling store and office furniture in the city of Chicago, and chiefly on South Wabash avenue between Twelfth

and Twentieth streets in said city, and that in his signs and in his advertisements has designated his place of business as "Bender Store and Office Fixtures" with the name "Bender" prominently displayed on signs in white letters on a blue background, and has become known and is designated as "Bender, dealer in store and office fixtures," and by that name has an established business in store and office fixtures, and a favorable name and reputation for honesty and for selling good goods at cheap prices which is valuable to him; that appellant Stone has for many years been engaged in the same line of business, but has sold an inferior grade of goods; that the said Stone and one Ella Graham and one R. J. Cupler, for the purpose of defrauding and cheating the public and inducing the customers of appellee to deal and trade with them in the belief that appellee was connected in business with them, have adopted the name of "The Bender Store & Office Fixture Co." and by that name have become incorporated, and under that name are doing business at 1120 South Wabash avenue in the City of Chicago; that by that name they have advertised themselves by signs in white letters on blue background, in which the name "Bender" appears prominently, similar to the signs of the complainant and otherwise; and on information and belief that the said Stone represented himself to be "Bender," the proprietor, and thereby the public and the customers of appellee have been deceived and the business of appellee has been reduced, his reputation injured and he has suffered loss and damage; that the corporation issued 250 shares of stock at the par value of \$10 per share and that the said Stone subscribed for and holds 248 shares, the said Ella Graham one share and the said R. I. Cupler one share; that there was in truth no person by the name of "Bender" connected with the corporation or its business. In addition to this verified bill complainant filed and presented to the court two affidavits. By one it is made to appear that the said Stone had said in the presence of affiant that he, Stone, was "Bender, the proprietor," and that the store run by him was Bender's store, and by the other it was made to appear that at the defendant's place of business were

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signs similar to those used by complainant, both in style and contents, and that defendant Stone had said he was thereby getting "a lot of cheap advertising." Appellants have not answered the bill, but have filed the affidavit of appellant, Stone, in which nearly all the allegations of the bill and the affidavits presented with it are denied, except that the corporation exists and is doing business and advertising under the name of The Bender Store & Office Fixture Company. While the appellants, by this affidavit of Stone, deny that the purpose or result of adopting the name "The Bender Store & Office Fixture Co." was to deceive the public, or to obtain from appellee his customers, no reason why that name was chosen and used is given, neither is it pretended that any one by the name of Bender is in any way connected with the corporation or its business.

*2 Appellants, by their argument in this court, place their right to have the order reversed on the following six grounds, quoted from their brief, viz:

1. There is no trade name in the name of an individual.
2. An injunction will not lie to restrain a corporation so using its name, at the instance of a person who has not previously acquired right to the exclusive use of the name.
3. The rights given by the statute to incorporate cannot be taken away by means of an injunction.
4. Where a number of persons bear the same name and do business under the same name none of them has a monopoly of it and no one of them can enjoin a corporation in which such name is used as a part of the name from using such corporate name.
5. The secretary of state is given absolute power regarding the granting of charters and when he has exercised that power a private individual may not enjoin the use of the name granted by the state.
6. The state law provides what power a corporation shall have and gives no veto power to a private in-

dividual with regard to the exercise of such powers.

None of these contentions can be adopted under the facts disclosed by the bill and affidavits filed by the respective parties in this case.

The protestation of Stone in his affidavit of the want of intent to deceive the public and the customers of appellee, and to injure appellee in his business by the adoption and use of his individual and business name, fall far short of overcoming the evidentiary force of the bald fact that the name was so used without any justifiable reason or excuse for so doing being given. Every sane person must be presumed to intend the natural and probable, as well as the inevitable, results of his deliberate acts, in spite of his assertions to the contrary. The act of appellants in assuming the name of appellee connected with his business appellation could not but mislead those who saw the signs and read the advertisements into the belief that appellee was interested in the business thus advertised and this regardless of whether any force is given to the affidavits of Portis that Stone said to him that he was Bender and that the place of business was Bender's, and that of Pretschold to the effect that Stone said he was getting a lot of cheap advertising out of the sign "Bender Store and Office Fixtures," and as to these affidavits we are bound to say the facts stated in them comport so exactly with the manifest purpose of appellants in assuming the name, as to carry conviction of their truth.

It is true, persons seeking to form a corporation may ordinarily choose any name their fancy dictates, subject, however, to the rule that they may not choose the name of a corporation already existing, or one that is to be used to deceive the public, or to be passed off for that of some other person or firm in business. *Allegretti v. Chocolate Cream Co.*, 177 Ill. 129; *Imperial Mfg. Co. v. Schwartz*, 105 Ill. App. 525; *De Long v. De Long Hook & Eye Co.*, 89 Hun, 399; *Van Houten v. Hooten Cocoa & Chocolate Co.*, 130 Fed. 600; *Nims on Unfair Business Competition*, sec. 102, p. 206. When a corporation violates that rule, it does so at its peril.

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Neither does the fact that the state issues a charter to a corporation by a certain name give to such corporation a right to use it, if it was deliberately chosen, or is used for the purpose of deceiving the public and thereby appropriating the business of another. *McFell Electric & Telephone Co. v. McFell Electric Co.*, 110 Ill. App. 182; *Imperial Mfg. Co. v. Schwartz*, 105 Ill. App. 525; *Peck Bros. & Co. v. Peck Bros. Co.*, 51 C. C. A. 251, 113 Fed. 291; *Garrett v. Garrett & Co.*, 24 C. C. A. 173, 78 Fed. 472; *J. & P. Coats, Limited, v. John Coats Thread Co.*, 135 Fed. 177; *De Long v. De Long Hook & Eye Co.*, 89 Hun, 399; *Nims on Unfair Business Competition*, sec. 102; *Hopkins on Unfair Trade*, p. 108. When such unfair name is selected by a corporation for the purpose of deceiving the public into the belief that its goods are the goods of another, the use of that name for that means will be enjoined. *McFell Electric & Telephone Co. v. McFell Electric Co.*, *supra*; *Hopkins on Unfair Trade*, p. 108; *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, 17 C. C. A. 576, 70 Fed. 1017. We think the rule goes even further and is that when the use of a name *results* in the palming off of one's goods on the public as the goods of another, the use of such name will be enjoined. *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, *supra*; *Stuart v. Stewart Co.*, 33 C. C. A. 480, 91 Fed. 243; *Pillsbury v. Flour Mills Co.*, 12 C. C. A. 432, 64 Fed. 841; *Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co.*, 11 Fed. 493; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665; *Meyer v. Medicine Co.*, 7 C. C. A. 558.

*3 Under the facts disclosed by the bill and affidavits in this record the Circuit Court would not have been justified in refusing the interlocutory injunction. What may be developed when appellants have answered the bill and the cause is heard on its merits we cannot foresee. Nor is it material to the disposition of this appeal. On the record here presented the interlocutory injunction was properly ordered.

The order is, therefore, affirmed.

Order affirmed.

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